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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN G. ALLISON,

Defendant and Appellant.

F041071

(Super. Ct. No. 01-69703)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. William Silveira, Jr., Judge.

Andrew Cappelli, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stan Cross and Sean M. McCoy, Deputy Attorneys General, for Plaintiff and Respondent.

* Before Vartabedian, Acting P.J., Harris, J. and Cornell, J.

Defendant Kevin G. Allison appeals from the imposition of the upper term of imprisonment upon his conviction of nonviolent escape from custody, Penal Code section 4532, subdivision (b)(1). We will affirm the judgment.

Facts and Procedural History

After jury trial, defendant was convicted on count 3, escape from custody. The jury acquitted defendant on counts 1 and 2, burglary and felony vandalism. The burglary and vandalism charges arose from events at the home of defendant's former girlfriend, in which defendant was severely beaten by the new boyfriend and suffered a serious head injury. The escape occurred when a partially disabled sheriff's deputy returning defendant from the hospital after treatment of the head injury, failed to place defendant in shackles. Defendant testified he walked away from the deputy; the deputy said defendant ran "like a track star."

Several months before trial, defendant had entered into a plea bargain pursuant to which he would be placed on probation. In connection with that plea bargain, the probation officer prepared a presentence report. That report included the substance of an interview with defendant, in which he admitted entering the house in question and destroying property, which he claimed was his. The court then rejected the plea bargain. The probation report was lodged in the court file.

At his subsequent trial, defendant testified that the occupants of the house invited him in and that the property was destroyed before he entered.

At sentencing, the court stated three aggravating factors that led the court to impose the upper term of imprisonment: defendant's criminal record was "serious and of increasing seriousness"; defendant was on probation and had recently violated additional terms of probation as soon as he was released from custody; and defendant "has shown no remorse." The probation report indicated there were no mitigating factors and the court mentioned none. Defense counsel disputed that defendant's criminal record was serious and argued in mitigation that no one was harmed in the escape and the deputy

“did not even choose to pursue” defendant. The court rejected this proposed factor in mitigation because defendant took advantage of the deputy’s mistakes and disability.

The court imposed the upper term of imprisonment, three years. Defendant filed a timely notice of appeal.

Discussion

Defendant contends the court abused its discretion in sentencing him to the upper term, both because the record does not support the court’s findings of factors in aggravation and because the court ignored factors in mitigation. The record, however, fails to support defendant’s claims.

First, defendant contends the court used the offenses of which defendant was acquitted to find that his criminal record was serious and of increasing seriousness. Whether or not the court was precluded from relying on defendant’s admission to the probation officer in light of the jury’s verdict (see *People v. Takencareof* (1981) 119 Cal.App.3d 492; but see *People v. Lewis* (1991) 229 Cal.App.3d 259), defendant’s criminal record fully supports the court’s conclusion without consideration of the present charges. After his first misdemeanor conviction in 1991, defendant had misdemeanor convictions in 1996, then 2000, then 2001. Clearly, the increasing frequency of his convictions reasonably can be considered in concluding his record of criminal conduct is increasingly serious: constant commission of misdemeanors is more serious than sporadic commission of such offenses. In addition, even though defendant’s record prior to these charges was comprised of misdemeanors, the similar nature of the past offenses indicates defendant has refused to reform his conduct, despite jail commitments as a condition of probation. Recidivist criminal conduct reasonably can be considered more serious than a single instance of such conduct in isolation, especially when that distinction is used in determining whether a lesser sentence on the present offense will be effective.

Second, defendant says the court erred in concluding defendant had shown no remorse for his crime. The probation officer reported that defendant did articulate remorse and that he “regrets his actions and the embarrassment he caused the Tulare County Sheriff’s Department.” Although the court did not further explain its finding of no showing of remorse, it appears the court was referring to defendant’s denial of responsibility for the burglary and vandalism in his testimony to the jury after admitting the conduct to the probation officer at the time of the plea negotiations.

Even assuming such reliance by the court would run afoul of *People v. Takencareof*, *supra*, 119 Cal.App.3d 492, and assuming that case is still good law, any error in this regard by the trial court was not prejudicial: it is not reasonably likely the court would have imposed a lesser sentence in the absence of consideration of the remorse factor. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) In addition to defendant’s criminal record, the court noted that defendant previously had violated probation granted in 2000 by committing a new crime in 2001 and that he committed the present offense while on probation for both of those offenses. Because the court found no factors in mitigation, these aggravating factors fully supported the upper term of imprisonment without any consideration of the remorse issue.

Defendant also contends, however, that there were mitigating factors ignored by the trial court. Defendant says he was suffering from a mental or physical condition that significantly reduced his culpability for the crime (Cal. Rules of Court, rule 4.423(b)(2)) and exercised caution to avoid harm to the deputy (Cal. Rules of Court, rule 4.423(a)(6)).

The record does not support an inference defendant exercised caution to avoid harm to the deputy. As the trial court found in rejecting this as a mitigating factor, defendant simply took advantage of the deputy’s disability and erroneous failure to shackle defendant. The fact that defendant did not use or have to use force or violence to make his escape prevented him from committing the significantly more serious felony of

forcible escape (Pen. Code, § 4532, subd. (b)(2)), but it did not mitigate the commission of the crime of which he was convicted.

Nor does the record support defendant's claim he "was not thinking properly" as a result of the head injury that required him to be transported to the hospital on the occasion of his escape. Within the narrow reality of those who escape custody, defendant's actions were both rational and successful. He escaped from custody, visited friends to obtain nonjail clothing, got a ride to New Mexico, and turned himself in to Border Patrol agents six months later when they questioned his identity as he returned from Mexico. In the broader reality of the criminal justice system, no one who escapes is "thinking properly"; all have a "reason" to flee that seems sufficient at the time but is, almost always, wholly insufficient in retrospect. The trial court did not abuse its discretion in determining that defendant's bad judgment was not a mitigating factor.

Defendant has not demonstrated the court abused its discretion in imposing the upper term of imprisonment.

Disposition

The judgment is affirmed.